

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

LOUIS RUPP

Claimant

VS.

SYSCO FOOD SERVICES, INC.

Respondent

AND

FIDELITY & GUARANTY INS. CO.

Insurance Carrier

Docket No. **1,003,714**

ORDER

Respondent and its insurance carrier requested review of the April 9, 2009 Order by Administrative Law Judge Bruce E. Moore. The Board heard oral argument on September 9, 2009.

APPEARANCES

Melvin J. Sauer, Jr. of Hays, Kansas, appeared for the claimant. Mark E. Kolich of Lenexa, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The sole issue is whether the Administrative Law Judge (ALJ) had jurisdiction to pay claimant's attorney post-award attorney fees. It was undisputed that claimant's attorney filed an Application for Post Award Medical and respondent did not provide the requested medical until after claimant's deposition was taken. Claimant's attorney then requested attorney fees for the time expended on the request for additional medical treatment. But respondent argued that as a prerequisite to an award of attorney fees for post-award

services the plain language of K.S.A. 44-536(g) requires that a hearing and resultant award be entered by the ALJ.

A hearing on claimant's request for attorney fees was scheduled but the parties agreed to waive the hearing and submitted the matter to the ALJ based upon their briefs and attached exhibits. The ALJ awarded claimant's counsel attorney fees in the amount of \$1,275.

Respondent requests review of whether the ALJ erred in ordering respondent to pay for post-award attorney fees pursuant to K.S.A. 44-536(g). Respondent argues that K.S.A. 44-536(g) allows the assessment of a fee where legal services "result in an additional award of medical compensation." Respondent further argues that without a hearing and an award there is no jurisdiction for the ALJ to order respondent to pay claimant's attorney's fees.

Claimant argues that respondent cannot reasonably deny that the work on claimant's behalf was directed toward securing additional medical benefits for claimant and therefore the ALJ's Order should be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

As previously noted the facts are undisputed. This claim was resolved by an Agreed Award on October 23, 2002, which left future medical treatment open subject to application and hearing unless the parties otherwise agreed. On January 22, 2008, claimant filed an application for post-award medical treatment. Before respondent would agree to provide the benefits it scheduled claimant's deposition. Claimant's counsel prepared for and attended the deposition on March 24, 2008. Some time after the deposition the respondent agreed to voluntarily provide the requested benefits. No agreed order was submitted to the ALJ.

Claimant's counsel then sent respondent a bill for the time spent on the request for post-award medical benefits. When payment was denied a hearing was scheduled on the issue of the post-award attorney fees. But respondent's counsel by letter requested an advisory opinion from the ALJ on the issue of whether the ALJ had jurisdiction to enter an award for post-award attorney fees in the absence of a hearing and decision on the post-award medical request. Interestingly, the ALJ responded to the request for an advisory opinion and by letter stated that K.S.A. 44-536(g) provided latitude to award attorney fees for legal services rendered to secure post-award medical treatment even in the absence of a formal post-award hearing and order on the request for additional medical treatment.

As previously noted, the parties agreed to waive hearing on the request for attorney fees and submitted the matter to the ALJ based upon their briefs and attached exhibits. The ALJ awarded attorney fees and respondent appeals.

Initially, it must be noted there is no dispute regarding the amount of the attorney fees awarded nor is there any dispute that claimant's attorney performed legal services in connection with claimant's request of additional medical treatment subsequent to the ultimate disposition of the original claim.

K.S.A. 44-536(g) allows for attorney fees, post-award, in certain situations.

In the event any attorney renders services to an employee or the employee's dependents, subsequent to the ultimate disposition of the initial and original claim, and in connection with an application for review and modification, a hearing for additional medical benefits, an application for penalties **or otherwise**, such attorney shall be entitled to reasonable attorney fees for such services, in addition to attorney fees received or which the attorney is entitled to receive by contract in connection with the original claim, and such attorney fees shall be awarded by the director on the basis of the reasonable and customary charges in the locality for such services and not on a contingent fee basis. If the services rendered under this subsection by an attorney result in an additional award of disability compensation, the attorney fees shall be paid from such amounts of disability compensation. If such services involve no additional award of disability compensation, but result in an additional award of medical compensation, penalties, or other benefits, the director shall fix the proper amount of such attorney fees in accordance with this subsection and such fees shall be paid by the employer or the workers compensation fund, if the fund is liable for compensation pursuant to K.S.A. 44-567 and amendments thereto, to the extent of the liability of the fund. If the services rendered herein result in a denial of additional compensation, the director may authorize a fee to be paid by the respondent.¹ (Emphasis Added)

And K.S.A. 44-536(h) further provides that all disputes regarding attorney fees shall be heard and determined by the ALJ.

The Kansas Workers Compensation Act permits a claimant to request post-award medical benefits² and authorizes an award of attorney fees in connection with that request.³ The purpose of the attorney fee statute is to encourage attorneys to represent claimants in circumstances where there is no additional award of disability compensation from which

¹ K.S.A. 44-536(g).

² K.S.A. 2002 Supp. 44-510k(a).

³ K.S.A. 2002 Supp. 44-510k(c) and K.S.A. 44-536(g).

a fee could be taken.⁴ The general purpose of allowing attorney fees in these situations includes the policy reasons that (1) attorney fee awards serve to deter potential violators and encourage voluntary compliance with the statute involved; and (2) statutes allowing an award of attorney fees are not passed to benefit the attorney, but are passed to enable litigants to obtain competent counsel.⁵ Thus, the Workers Compensation Act provides that an attorney who represents an employee is entitled to reasonable attorney fees for services rendered after the ultimate disposition of the initial and original claim. And if those legal services result in no additional award of disability compensation but result in an additional award of medical compensation or other benefits the director shall fix the proper amount of such attorney fees to be paid by the employer.

The ALJ's Order provided in pertinent part:

Here, Claimant's counsel provided additional services to Claimant, subsequent to the ultimate disposition of the initial and original claim, in connection with an application for hearing on a request for additional medial benefits. While no hearing on the application was held, Claimant's counsel expended significant time and effort, some eight and one-half hours, prosecuting the application, including preparation for and attendance at Claimant's deposition. Without such effort, and Claimant's deposition, the additional medical treatment would not have been afforded. The language of K.S.A. 44-536 (g) ("or otherwise") is broad enough to include time and effort expended in pretrial proceedings that may obviate the need for a formal hearing.

The court finds and concludes that, under the circumstances herein presented, Claimant has established his entitlement to post-Award attorneys fees. To rule otherwise could have a chilling effect on counsel taking action on applications for post-Award medial treatment.

The Board agrees and affirms. Conducting an actual hearing, post-award, is not a prerequisite for awarding attorney fees. The fact that post-award legal representation was necessary and provided is sufficient. Accordingly, the ALJ had the discretion to award attorney fees in this case.

Respondent cites the *May*⁶ and *Naff*⁷ cases as supporting its contention that an award of attorney fees is not appropriate. The Board disagrees. The Board concludes that

⁴ *Robinson v. Golden Plains Health Care*, No. 239,485, 2004 WL 2522324 (Kan. WCAB Oct. 25, 2004).

⁵ *Hatfield v. Wal-Mart Stores, Inc.*, 14 Kan. App. 2d 193, 199, 786 P.2d 618 (1990).

⁶ *May v. University of Kansas*, 25 Kan. App. 2d 66, 957 P.2d 1117 (1998).

⁷ *Naff v. Davol, Inc.*, 28 Kan. App. 2d 726, 20 P.3d 738 (2001).

Naff is distinguishable from this claim. In *Naff*, the Board was attempting to prevent an abuse of the workers compensation system. Conversely, in this claim the Board finds that claimant's request for additional medical treatment and post-award attorney fees does not constitute an attempt to abuse the system. The Board finds that claimant's attorney's actions requesting additional medical treatment and attending the claimant's deposition were necessary in order to obtain the requested post-award medical benefits. Accordingly, *Naff* is distinguishable for two reasons: first, the Board specifically finds claimant is not attempting to abuse the workers compensation system, and second, the claimant had requested additional medical treatment which was not provided until after claimant's deposition was taken.

Likewise, the *May* case is distinguishable. In *May*, there was no evidence contained in the record that the services claimant's attorney and office staff performed were necessary to insure the respondent paid the medical bills submitted. The record did not contain any evidence that the respondent failed to comply with the award. The ministerial services itemized and provided by claimant's attorney were not necessary to insure the respondent complied with the ALJ's order. Therefore, the attorney fees were denied. In the instant case, claimant requested additional medical treatment and submitted to an evidentiary deposition before respondent agreed to provide the benefits.

AWARD

WHEREFORE, it is the decision of the Board that the Order of Administrative Law Judge Bruce E. Moore dated April 9, 2009, is affirmed.

IT IS SO ORDERED.

Dated this 30th day of September 2009.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Melvin J. Sauer, Jr., Attorney for Claimant
Mark E. Kolich, Attorney for Respondent and its Insurance Carrier

LOUIS RUPP

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Bruce E. Moore, Administrative Law Judge